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OCTOBER TERM, 1959

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ARTHUR M. McPHAUL,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent

REPLY BRIEF OF PETITIONER

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I.

In answering petitioner's claim that he could not be convicted of contempt of the House Committee on Un-American Activities, because of lack of any evidence to prove the existence of the subpoenaed records or possession by petitioner, the government advances the following proposition in its brief:

> "The government's proof here established a *prima facie* case of wilful refusal to produce because, in view of the Sub-Committee's reasonable basis for believing that petitioner could produce and his failure to offer any excuse to the Committee for his refusal to do so, it was a reasonable inference that he could have done so. The burden was then shifted to petitioner to present some evidence to explain or justify his refusal * * * When petitioner elected at the trial not to do so, he in effect removed that issue from the case." (Gov't Br. p. 25.)

We believe that this line of argument is fallacious for the following reasons:

1. The government seeks to import into the law relating to criminal contempt of congressional committees a new concept, the "reasonable" basis for belief by the Committee in the existence and possession of records as a substitute for proof at the trial. The government cites no authority for this proposition and we have found none. The decisions have uniformly held that proof of existence and possession are essential elements of the crime which the government must prove (Pet. Br. p. 11).

2. Accepting, arguendo, the government's theory, the record does not support its claim that a "reasonable" basis existed for the belief that petitioner could produce the records.

The government concedes that the *only* evidence in this record is that the Committee "had information that Mr. McPhaul was executive director or executive secretary of the Civil Rights Congress" (Gov't Brf. p. 16).

The testimony on this point is so brief that we quote it in full:

"A. (Senator Potter): I believe in 1947, I am not certain of the exact date. The committee had information that Mr. McPhaul, according to the letterheads of the Civil Rights Congress of the State of Michigan, that he was an executive director—executive secretary of the Civil Rights Congress and therefore that fell within the purview of our committee" (Tr. 17).

"A. (Senator Potter): The Committee had information that Mr. McPhaul was executive director or executive secretary of the Civil Rights Congress" (Tr. 21).

It should first be noted that even this skimpy testimony was introduced by the government on a separate record dealing only with the issue of pertinency and outside the presence of the jury. In presenting this argument in its brief the government ignored this fact. Yet it is difficult to understand how it can rely upon this evidence to support its claim that it established a *prima facie* case of wilful failure to produce records when the evidence was not offered or received for that purpose at the trial.

Nevertheless, it is on the basis of this evidence that the government argues that it is "a reasonable inference that he (petitioner) could have" produced the records. We submit, however, that the gap between this evidence and the conclusion sought to be drawn by the government, namely, that petitioner was in possession of the subpoenaed records, cannot be bridged by any rational or reasonable inference.

First, the Committee's belief was apparently based upon letterheads of the Civil Rights Congress "in 1947" showing that a Mr. McPhaul was executive director or executive secretary. Assuming that this information might permit

an inference that Mr. McPhaul had access to the organization's records in 1947, it does not permit an inference that he had possession five years later, in 1952, when the subpoena was issued. Cf. *U. S. v. Patterson*, 219 F. 2d 659; Pet. Br. p. 9, where the Court held that proof of the defendant's possession of records in June did not justify an inference of continued possession in October, four months later.

Second, there was no evidence to show that the McPhaul whose name appeared on the letterhead was the same person as petitioner. The government attempted to make such proof at the trial but was unable to do so and the letterhead was rejected as evidence (Tr. 47-51).

Third, there was no evidence that the Civil Rights Congress of Michigan was in existence in 1952 or that it had any records; or, if it did, that petitioner ever had any membership in or association or official position with the organization.

In the absence of any evidence that the records sought had existed and, if they had, of some relationship between the records and the witness at the time the subpoena was issued, it cannot be said that there was "a reasonable" basis for the belief that petitioner could produce the records.

3. The government argues that because the evidence showed that the Committee had "reasonable" grounds for believing that petitioner could have produced the records, "the burden was then shifted to petitioner to present some evidence to explain or justify his refusal." This argument misconceives the Trial Court's ruling.

The Trial Court did not hold that the government had made a *prima facie* case on the existence and possession

of the records, as the government now asserts. The Court assumed, correctly we believe, that *no* such evidence had been introduced, but held that the government was absolved from introducing any evidence on this issue. And, far from holding that the burden had shifted to the petitioner to introduce evidence as to non-existence or lack of possession, he made it clear that there was no burden to shift because these issues *could not be litigated at the trial at all*, since petitioner had failed to bring these matters to the Committee's attention at the time of his appearance. In his opinion denying petitioner's motion for a directed verdict, he said:

> "• • • he should have given the sub-committee an opportunity to have explored these matters further at that time by questions or otherwise; and that not to have made such an explanation before the sub-committee at the time he appeared does not entitle him now to raise these matters by way of defense in this case" (Tr. 61).

And again in his charge to the jury:

> "I charge you that you may not consider the questions of whether the records and documents designated in the subpoena were actually in existence or under the possession or control of the defendant, because if the defendant had legitimate reasons for failing to produce the said records, he should have stated his reasons for non-compliance with the subpoena when he appeared before the said sub-committee" (Tr. 67).

Thus, the rationale of the Trial Court was that a witness must raise the issue of non-existence or non-possession of records before the Committee so as to give it the opportunity to explore the matter further; that he cannot raise the issue for the first time at the trial because then it would be too late for the Committee to ask further

questions which might have resulted in the production of the records or, alternatively, in ascertaining that there were no such records.

The government adopts this same view:

> "Had petitioner made such a showing, (non-existence or non-possession) the sub-committee could then have taken whatever further steps might have been appropriate for obtaining the documents, such as subpoenaing them from someone else. The inquiry in that event, might not have been blocked." (Gov't Br. p. 17.)

But if this is the reason for the rule, then it would logically follow that the defendant should not be permitted to introduce evidence *at the trial* to prove non-existence or non-possession; for the evidence then (in this case four year later) would not assist the Committee in obtaining the records. This, of course, is precisely what the Trial Court held.

But the government, while accepting this rationale, also takes the incongruous and inconsistent position that the petitioner had the right to "present some evidence to explain or justify his refusal." The reason for this contradiction, we believe, is because the government's position is legally unsound.

On the one hand it relies principally on *U. S. v. Bryan*, 339 U. S. 323, where this Court held that, by not raising the procedural objection of lack of a quorum before the Committee, the defendant was foreclosed from raising the issue at the contempt trial. On the other hand, the government recognizes that existence and possession of records are not procedural matters which may be waived, as in *Bryan*, but are essential elements of the crime which must be proved by some evidence.

The government's dilemma thus stems from the Trial Court's decision that petitioner could be convicted of wilfully refusing to produce records without any evidence that the records were in existence or within his control. To uphold this decision requires, not the shifting of the burden of proof, but conviction without proof. This is the conclusion which logically flows from the government's premise, but which the government is apparently unwilling to urge upon this Court.

4. The government also contends, quoting from *U. S. v. Fleishman*, 339 U. S. 349, that

> "* * * the prosecution is under a serious practical handicap if it must prove the negative proposition—that [petitioner] did not or had no good reason for failing to try to comply with the subpoena insofar as he was able." (Gov't Br. p. 28.)

In *Fleishman*, as in *Bryan*, existence of the records and possession by Miss Bryan was admitted. The Court's remarks, as to the difficulty of proving a negative, were directed to the claim of the defendant that the government had not proved that further efforts on his part as a member of the organization's executive Board would have produced the records.

But in this case, the government was not required to prove a negative. To the contrary, it was required to prove a positive—that the subpoenaed records were in existence and that petitioner had some measure of custody or control. Proof of these two elements of the crime of contempt may indeed have presented a "practical handicap" to the government in this case, particularly if no such records existed or, if they did, that petitioner was in no position to produce them. But, if the presumption of in-

nocence is to obtain, the government is not entitled to a conviction without such proof.

II.

The government answers petitioner's claim (Pet. Br. pp. 16-17) that the Trial Court's ruling effectively curtailed his privilege against self-incrimination, by asserting that

> "'* * * it is well settled that books and records kept in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate [their keeper] personally.'"—quoting from *U. S. v. White*, 322 U. S. 694 (Gov't Br. p. 18).

In making this legal argument the government assumes what it was unable to prove—that petitioner was holding the subpoenaed records (if indeed such records existed) in a *representative* capacity. This assumption has no basis in the record. We have already shown (*supra* p. 4) that there is *no* evidence connecting petitioner with the Civil Rights Congress. And even if the testimony taken on a separate record on the issue of pertinency be considered on this aspect of the case, it showed only that a Mr. McPhaul was an officer of the organization in 1947, five years before the subpoena was issued.

Furthermore, the subpoena itself was not issued to the Civil Rights Congress and served on petitioner as its officer, nor was it addressed to him as an officer of the organization. It was addressed to him personally and re-

quested him to bring the records of the organization.* And when petitioner appeared before the Committee it was as an individual and not in any representative capacity.

Despite the fact that there is no evidence that petitioner held the organization's records (if any existed) in a representative capacity, the government would strip him of his right to the Fifth Amendment privilege by the hearsay statement of the witness that five years earlier a person with a similar name was listed as an officer of the organization.

If petitioner were *not* holding records in a *representative* capacity, it is conceded he would have the right to the privilege. If the government intended to rely upon this point to establish that the witness had no right to claim the privilege and therefore no right to withhold production of any organizational records in his possession, the burden was on the government to prove this fact at the trial. To deprive petitioner of the constitutional protection without

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*Decisions of this Court which have discussed the appropriate form for subpoenas to compel the production of organization or corporate records indicate that the subpoena should be issued to the corporation or organization and served upon an officer, or, in the alternative, issued directly to the officer *in his official capacity*.

See: *Wilson v. U. S.*, 221 U. S. 361 (Subpoena issued to corporation; served on defendant as president).

Brown v. U. S., 276 U. S. 134 (Subpoena issued to organization; served on defendant as secretary).

U. S. v. White, supra (Subpoena issued to union; served on defendant as president).

U. S. v. Bryan, supra (Subpoena issued to organization; served on defendant as executive secretary).

U. S. v. Fleishman, supra (Subpoena issued to organization; served on defendant as executive board member. See footnote 4, at p. 353, for discussion of this subject).

such proof is to effectively curtail the privilege in the manner pointed out in our main brief (p. 17).

Respectfully submitted,

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